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In The

Supreme Court of the United States

October Term, 1996

JAY LEE GATES, JOHN RONALD BERTRAM,

Petitioners,

v.

RON SHINN; JAMES ROWLAND; NADIM KHOURY, M.D., Assistant Deputy Director – CDC Health Services; KENNETH SHEPARD, Chief Deputy Warden for CMF Clinical; NICHOLAS POULOS, M.D., DANIEL E. THOR, Chief Physician and Surgeon, CMF; PAUL MORENTZ, Chief Psychiatrist – CMF Outpatient Program; H MD; BRUCE BAKER; A R MD, Chief Psychiatrist Northern Reception Center; D. MICHAEL O'CONNOR; DOUGLAS G. ARNOLD, Acting Director of the California Department of Mental Health; CLYDE MURREY, Acting Deputy Director for State Hospitals; SYLVIA R.N., Executive Director DMH Vacaville Psychiatric Program; EDDIE YLST,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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156 pp

QUESTIONS PRESENTED FOR REVIEW

In 1989, the parties entered into a Consent Decree to resolve an enormously complex class action lawsuit over mental health care in the California state prison hospital at Vacaville. Among other things, the Decree requires defendants to provide "appropriate psychiatric evaluation and treatment . . . as medically indicated," and establishes a mediation process for resolving disagreements about implementing that requirement. Defendants never sought clarification or modification of the Decree and, in 1995, the Ninth Circuit specifically held that the "appropriate psychiatric evaluation" standard in the Decree is not ambiguous and is fully enforceable.

The district court found that defendants intentionally violated the Decree over a period of several years, including refusing to participate in good faith in the mediation process, and that members of the class "suffered and died" as a result. Defendants made no factual showing that their conduct satisfied any possible interpretation of the Decree. Nevertheless, on appeal from the district court's judgment of contempt, another Ninth Circuit panel held the Decree ambiguous and beyond the district court's power to enforce. The questions are:

1. *Did the Ninth Circuit correctly hold — in conflict with decisions of the Sixth and Eleventh Circuits — that a district court does not have power to enforce a consent decree embodying a flexible mechanism for achieving compliance, and to reject defendants' "ambiguity" defense, even though defendants willfully violated the decree for years without claiming it needed clarification?*

2. *Should the doctrine of the law of the case be mandatory, as it is in the Third and Fifth Circuits, or discretionary, as it is in the Ninth Circuit?*

PARTIES TO THE PROCEEDINGS BELOW

The Petitioners (Plaintiffs-Appellees in the Ninth Circuit) are Jay Lee Gates and John Ronald Bertram, on behalf of a class of prisoners confined to the California Medical Facility ("CMF"), a state prison located in Vacaville, California.

The Respondents (Defendants-Appellants in the Ninth Circuit) are various administrators and public officials of the California Medical Facility, the California Department of Corrections, and the California Department of Mental Health. All respondents are employees of the State of California.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED FOR REVIEW i

PARTIES TO THE PROCEEDINGS BELOW ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES v

OPINIONS BELOW 2

JURISDICTION 3

RELEVANT PROVISIONS 3

STATEMENT OF THE CASE 3

The Consent Decree and its Enforcement Process 3

The Psychiatric Care Provision at Issue Here . 6

The History of the Present Dispute 7

The Ninth Circuit Panel's Decision 11

REASONS WHY THE PETITION SHOULD BE GRANTED 14

Introduction 14

I. THE COURT SHOULD GRANT THE PETITION TO RESOLVE THE CONFLICT AMONG THE CIRCUITS CON-

CERNING WHETHER A DEFENDANT, WHO HAS FAILED TO SEEK MODIFICATION OR CLARIFICATION OF A CONSENT DECREE PROVISION, MAY RAISE VAGUENESS AS A DEFENSE TO CIVIL CONTEMPT. 16

II. THE COURT SHOULD GRANT THE PETITION TO VINDICATE THE NATIONAL POLICY IN FAVOR OF SETTLEMENT AND ALTERNATIVE DISPUTE RESOLUTION IN THE CONSENT DECREE CONTEXT 21

III. THE COURT SHOULD GRANT THE PETITION TO ENHANCE JUDICIAL ECONOMY AND PROMOTE FAIRNESS AND CERTAINTY BY MAKING THE DOCTRINE OF LAW OF THE CASE MANDATORY RATHER THAN DISCRETIONARY 25

CONCLUSION 29

APPENDIX

Ninth Circuit Opinion A-1

Ninth Circuit Order dated December 6, 1996 . . . A-25

District Court Order dated October 27, 1994 . . . A-27

Consent Decree A-70

District Court Order dated March 8, 1990 . . . . A-115

TABLE OF AUTHORITIES

CASES

Page

Arizonans for Official English et al. v. Arizona,
___ U.S. ___, 117 S.Ct. 1055
(March 3, 1997) 25

Cohen v. Brown,
101 F.3d 155 (1st Cir. 1997) 27

Combs v. Ryan's Coal Co., Inc.,
785 F.2d 970 (11th Cir. 1986) 14, 17, 18

Donovan v. Mazzola,
761 F.2d 1411 (9th Cir. 1985) 8

Eichman v. Fotomat Corp.,
880 F.2d 149 (9th Cir. 1989) 25, 26

Gates v. Deukmejian,
987 F.2d 1392 (9th Cir. 1992) 2

Gates v. Gomez,
60 F.3d 525 (9th Cir. 1995) . . . . . *passim*

Gates v. Rowland
39 F.3d 1439 (9th Cir. 1994) . . . . . *passim*

Gates v. Shinn,
98 F.3d 463 (9th Cir. 1996) . . . . . *passim*

Glover v. Johnson,
934 F.2d 703 (6th Cir. 1991) 14, 16, 17

Hanna Boys Center v. Miller,
853 F.2d 682 (9th Cir. 1988) 26

Hanover Insurance Co. v. American Engineering Co.,
105 F.3d 306 (6th Cir. 1997) 27

Harris v. Sentry Title Co.,
806 F.2d 1278 (5th Cir. 1987) 27

Hutto v. Finney,
437 U.S. 678 (1978) 20

International Longshoreman's Ass'n v. Philadelphia Marine Trade Ass'n,
389 U.S. 64 (1967) 17

Kimball v. Callahan,
590 F.2d 768 (9th Cir.), *cert. denied*,
444 U.S. 826 (1979) 25

Lesko v. Lehman,
925 F.2d 1527 (3rd Cir. 1991) 27

Liberty Mutual Insurance Co. v. EEOC,
691 F.2d 438 (9th Cir. 1982) 26

McComb v. Jacksonville Paper Co.,
336 U.S. 187 (1948) 16, 18

Pit River Home and Agr. Co-Op Ass'n v. United States,
30 F.3d 1088 (9th Cir. 1994) 26

Rufo v. Inmates of Suffolk County Jail,
502 U.S. 367 (1992) 19, 20, 22

Securities Exchange Commission v. Naftalin,
460 F.2d 471 (8th Cir. 1972) 8

Swann v. Charlotte-Mecklenberg Board of Education,
402 U.S. 1 (1971) 20

United States Office of Personnel Management v. FLRA,
905 F.2d 430 (D.C. Cir. 1990) 28

United States v. Houser,
804 F.2d 565 (9th Cir. 1986) 26

United States v. ITT Continental Baking Co.,
420 U.S. 223 (1975) 19

United Steelworkers v. Warrior & Gulf Navigation Co.,
363 U.S. 574 (1960) 24

Vieux Carre Property Owners Residents & Assocs. v. Brown,
40 F.3d 112 (5th Cir. 1994) 28

Walker v. City of Birmingham,
388 U.S. 307 (1967) 14, 16, 18

Young v. United States ex. rel. Vuitton et Fils S.A.,
481 U.S. 787 (1987) 14

STATUTES

The Civil Justice Reform Act of 1990
28 U.S.C. § 473(b)(5) 23, 24

28 U.S.C. § 1254(1) 2

42 U.S.C. § 1983 3

Federal Rules of Civil Procedure
16 . . . . . 22, 23
65(d) 17, 19

PUBLICATIONS

Note, *Implementation Problems in Institutional Reform Cases*
91 Harv. Law Review 428 (1977) 4

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OCTOBER TERM, 1996

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RON SHINN; JAMES ROWLAND; NADIM KHOURY, M.D., Assistant Deputy Director - CDC Health Services; KENNETH SHEPARD, Chief Deputy Warden for CMF Clinical; NICHOLAS POULOS, M.D., DANIEL E. THOR, Chief Physician and Surgeon, CMF; PAUL MORENTZ, Chief Psychiatrist - CMF Outpatient Program; H MD; BRUCE BAKER; A R MD, Chief Psychiatrist Northern Reception Center; D. MICHAEL O'CONNOR; DOUGLAS G. ARNOLD, Acting Director of the California Department of Mental Health; CLYDE MURREY, Acting Deputy Director for State Hospitals; SYLVIA R.N., Executive Director DMH Vacaville Psychiatric Program; EDDIE YLST,

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OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Ninth Circuit, as amended, is reported as *Gates v. Shinn*, 98 F.3d 463 (9th Cir. 1996), and can also be found at Appendix 1-24.

A copy of the Court of Appeal's December 6, 1996 Order denying plaintiffs' Petition for Rehearing and Suggestion of Rehearing *En Banc* is attached hereto at Appendix 25-26.

The District Court's October 27, 1994 Order granting Plaintiff's (Petitioner's) motion for contempt is not reported. A copy of the Order is attached hereto as Appendix 27-69.

A copy of the governing Consent Decree in this case is attached hereto at Appendix 70-114.

A copy of the March 8, 1990 District Court Order approving the Consent Decree is attached hereto as Appendix 115-117.

There have been three other reported Ninth Circuit Opinions arising from the district court proceedings in this case rendered prior to the opinion from which review is sought, each of which substantially affirmed the district court's interpretation of the Consent Decree below. See *Gates v. Deukmejian*, 987 F.2d 1392 (9th Cir. 1992); *Gates v. Rowland*, 39 F.3d 1439 (9th Cir. 1994); *Gates v. Gomez*, 60 F.3d 525 (9th Cir. 1995).

JURISDICTION

Petitioner invokes this Court's *certiorari* jurisdiction under 28 U.S.C. § 1254(1). The Denial of the Petition for Rehearing and Suggestion of Rehearing *En Banc* occurred on December 6, 1996. On February 20, 1997, Petitioners made a request for a 30-day extension of time in which to file this Petition. The request for a 30-day extension was granted by Justice O'Connor on February 21, 1997, extending the time for the application "to and including April 5, 1997." By operation of law, see Supreme Court Rule 30(1), because April 5th is a Saturday, the Petition is due on April 7, 1997.

RELEVANT PROVISIONS

The full text of the Consent Decree in this case, which was approved and adopted by the District Court on March 8, 1990, can be found at Appendix 70-114.

STATEMENT OF THE CASE

The Consent Decree and its Enforcement Process

Petitioners Jay Lee Gates and Ronald Bertram ("Plaintiffs" or "Petitioners") represent a class of prisoners housed at the California Medical Facility ("CMF"), a state prison hospital in Vacaville, California. In 1987, the prisoners filed this lawsuit pursuant to 42 U.S.C. § 1983 (later amending to include claims under the Rehabilitation Act of 1973, 29 U.S.C. § 794), alleging unconstitutionally inhumane living conditions, deliberate indifference to serious medical and psychological needs, and discrimination against disabled inmates. (Ninth Circuit Excerpt of Record ["ER"] 324.)

In the fall of 1989, after three months of trial, the parties negotiated a settlement. The terms of the settlement were set forth in a Consent Decree. (ER 324.) After notice to the class and a fairness hearing, the district court adopted the Consent Decree as its judgment on March 8, 1990. (ER 524; Civil Docket No. ["CD"] 323.) A copy of the Consent Decree can be found at Appendix 70-114.

The Consent Decree requires improvements in the treatment of specified medical conditions, enhancements in general prison conditions, a test program integrating HIV-positive inmates into general population housing units, augmentation of the inpatient psychiatric care provided by the Department of Mental Health at CMF, and a comprehensive program providing outpatient psychiatric treatment to CMF's mentally ill inmates. It also includes a specific Alternative Dispute Resolution and attorneys' fees provisions. (App. 70-114.)

Given the size of the institution and the complex remedial goals of the parties, it is not surprising that the Consent Decree defers many of the details of implementation to future plans. (See App. 79, § IV.1 and § IV.3; App. 83, § V.A.3 & V.A.4.; App. 84-85, § V.B.3. & V.C.; App. 90, § V.F.5; App. 91-93, § V.G.3.; App. 95, § VI.5.; App. 96, § VII.B.; App. 99-100, § VII.F.; App. 101, § VII.J.) The improvement of substandard medical care at a prison hospital is necessarily a complex task requiring attention to thousands of details. See Note, *Implementation Problems in Institutional Reform Cases* 91 Harv. Law Review 428, 432 (1977) ("the complexity of large organizations is . . . an important factor in the difficulty of implementing change").

The Consent Decree is an organic document that is responsive to this complex backdrop. Many sections provide that issues will be resolved through further study,

through the hiring of outside experts to evaluate programs, or through future negotiation and mediation. (See subsections listed in previous paragraph, supra.) The Consent Decree includes an alternative dispute resolution ("ADR") process. (App. 102-109.) This ADR process employs a "Mediator" to meet with the parties and resolve disputes. (App. 105-109.)

The Defendants nominated and lobbied Allen Breed, a nationally renowned expert in corrections and a former California prison administrator, to serve as the Mediator. (App. 65.) His appointment was approved by the district court on March 30, 1990. (ER 525; CD No. 334.) Mr. Breed has been and continues to serve as the only Mediator in this case. (App. 65, ER 525-605.)

The Consent Decree establishes his role: "to work with the parties to resolve disagreements through mediation, but also [] to make findings and recommendations in a report to the district court on those matters that are not resolved through mediation." *Gates v. Rowland*, 39 F.3d 1439, 1443 (9th Cir. 1994); see App. 105-106, § IX.2. The Consent Decree also gives the Mediator the power to "work with the parties to develop plans of implementation or reports required by the provisions of this Consent Decree," and "to resolve disagreements over the adequacy of plans of implementation or reports that defendants are required to prepare." (App. 106.) Defendants bargained for this process and insisted on its inclusion in the ultimate Decree. (CD 1318.)

One aspect of the Mediator's role is to fill gaps in the Consent Decree where the parties were unable to agree on specific plans or procedures at the time of settlement. (See App. 106, § IX.2.b.) As to such plans or procedures, the parties provided that defendants would draft plans in the future and submit them to the ADR system. (App.

107, §§ IX.4 and IX.5.) Even in the absence of a dispute, the Consent Decree calls for the submission of most remedial plans to the Mediator and charges the Mediator or the Mediation process with judging their suitability. (See App. 79, § IV.1 and § IV.3; App. 83, § V.A.3 & V.A.4.; App. 84-85, § V.B.3. & V.C.; App. 90, § V.F.5; App. 91-93, § V.G.3.; App. 95, § VI.5.; App. 96, § VII.B.; App. 99-100, § VII.F.; App. 101, § VII.J.)

The Psychiatric Care Provision at Issue Here

This appeal is concerned with § V.F. of the Consent Decree, which covers outpatient psychiatric care. (See App. 87-90.) In § V.F., defendants promised to make comprehensive improvements in the outpatient mental health program. *Id.* § V.F.1 established an overall standard for outpatient mental health care at CMF:

> Defendants will provide appropriate psychiatric screening for each incoming inmate at CMF and will provide appropriate psychiatric evaluation and treatment for all inmates at CMF as medically indicated. (App. 87, § V.F.1.)

The specific requirements for the program and deadlines for its implementation are set forth in three pages of detailed provisions which follow in the Consent Decree: A new program for inmates discharged from inpatient care, known as the "outpatient psychiatric program," was to be developed and fully operational by June 30, 1990. (App. 87-88, § V.F.2.) A complete outpatient psychiatric program was to be fully staffed and operational by October 31, 1990. (App. 88-89, § V.F.3.) Specific standards, program elements and goals for the program are set forth, as is a procedure for evaluating defendants' compliance. (App. 87-90, § V.F.2-5.) These include, for example,

medical records and medication monitoring, staffing levels for clinical and custody staff, time limits for screening of incoming patients, and special programs for the mental health needs of the HIV-positive and patients discharged from inpatient psychiatric hospitalization. *Id.*

The Decree specifically assigns the Mediator the task of assessing the outpatient psychiatric program to determine if the program satisfies the standards set forth in §V.F. of the Decree:

> The Mediator, if necessary, will independently investigate the program, in the determination of the adequacy of defendants' program for providing appropriate psychiatric services.

(See App. 90, § V.F.5.)

The History of the Present Dispute

The present dispute began with a motion by plaintiffs in July of 1993 seeking to have defendants held in civil contempt for failing to design and implement the outpatient psychiatric program required by §V.F. (Ninth Circuit Supplemental Excerpt of Record ["SER"] 562.)

At a hearing before the Magistrate Judge on January 27, 1994, defendants restated their refusal to adopt any of the recommendations of the Mediator's experts for bringing defendants' outpatient psychiatric program into compliance with the Consent Decree, even those with which their own expert did not take issue. (ER 327.)

On July 25, 1994, the magistrate judge issued a Certification of Facts, Recommendations, and Order in which he found "that defendants are in willful and con-

temptuous disobedience of the orders of the district court." (CD 1122; SER 555; see SER 554-570.) The magistrate judge also issued an order directing the Mediator to work with his experts to prepare a revised Outpatient Psychiatric Program Plan for the district court to consider in fashioning a remedy. (CD 1121; SER 573-74.)

On October 27, 1994, the district court issued the order that is the subject of this appeal. The court made a factual finding that defendants' delay in developing and implementing an adequate psychiatric program or plan was knowing, persistent, and intentional. (App. 34, 38-41, 49-52.) The court also found that as a result of defendants' failure to comply with the Consent Decree, "inmates at the California Medical Facility . . . suffered and died as a result of conditions which the consent decree . . . was designed to correct." (App. 39.)

The district court held defendants in contempt for their failure to comply with § V.F.1. (App. 49-54.) The court also found that defendants had not complied with the more detailed subsections V.F.2 and V.F.3, requiring, for example, appropriate medication monitoring, appropriate recordkeeping, and the minimization of isolation and seclusion of mentally ill inmates in their cells. (See App. 45, n.11.) The court stayed, however, all contempt fines and established procedures, including issuance of an order to show cause and a hearing, before any contempt fines would be imposed on defendants.[1/] (App. 66, 68.)

[1/] For this reason, plaintiffs contended in the Ninth Circuit that the district court had not issued an appealable order. See *Donovan v. Mazzola*, 761 F.2d 1411, 1416-17 (9th Cir. 1985) (civil contempt not appealable until sanctions imposed); *S.E.C. v. Naftalin*, 460 F.2d 471, 475 (8th Cir. 1972) (same).

In part, the district court rested the finding of contempt on the fact that defendants resisted meaningful participation in the ADR process they helped create:

> The record of consistent disregard for deadlines, failure to cooperate with plaintiffs and the Mediator despite repeated findings of noncompliance, and overt defiance of the magistrate judge permit no other conclusion. Defendants have persisted in this pattern of procrastination and delay despite the threat of sanctions. . . . The sheer number of delays in the face of such cautionary notice generates an inescapable inference of intentional conduct.

(App. 40.) The court found that defendants refused "to cooperate in good faith with the very process designed to provide specific content to the terms of the decrees." (App. 54.)

The district court also relied on the lack of a factual showing by defendants supporting the adequacy of their Outpatient Program using any medical standard:

> [Plaintiffs' expert] Dr. Meenakshi assessed defendants' December 1993 [Outpatient Psychiatric Program] Plan and the actual operation of the [Outpatient Psychiatric Program] as of December 1994, and found both to be clinically inadequate on numerous grounds. . . . Defendants provide no grounds for doubting the accuracy of Dr. Meenakshi's observations or the validity of her expert opinions. No evidence contradicting her testimony was provided below.

(App. 38.) In other words, defendants made no factual effort to show they satisfied any possible meaning of the phrase "appropriate psychiatric evaluation and treatment as medically indicated." (App. 45-52.)

The district court rejected defendants' argument that § V.F.1 is too vague to enforce, finding that § V.F.1 is "clear and explicit" and "establishes a clinical standard for appropriate mental health care generally and for the adequacy of particular OPP elements, which are specified components of such care." (App. 56.)

In response to defendants' vagueness argument — an argument raised for the first time before the district court in October 1994, after years of discussion by the parties regarding the provision and the plans called for thereunder — the district court stated that:

> In the matter at bar, defendants had ample and repeated notice that their conduct violated the Decree. Fourteen separate orders of the court over a three-year period adopted findings of non-compliance with the provisions at issue here. Thus, defendants' campaign of stonewalling behavior cannot be construed as innocent conduct which breached an invisible or unascertainable boundary. . . .
>
> [Defendants'] argument [that the provision is too ambiguous to enforce] fails for several related reasons. First, as I have already explained, the due process concern for fair notice of violation is satisfied on the facts of this case. Second, because the phrases at issue were mutually agreed upon by the parties, and defendants have never sought

> their modification, the objections as to vagueness are disingenuous. . . .
>
> Having consented to a standard of adequacy explicitly based on clinical norms, defendants cannot credibly maintain that they have been unaware of the applicable standard or that its parameters have been unascertainable. The expert opinions on which the historical findings of non-compliance have been based have always been provided to defendants, and the concomitant recommendations for achieving compliance have been as regularly ignored.

(App. 48-50.) The court also found that "like the hard-core violator of an arguably vague statute, defendants have engaged in conduct that indisputably violates the consent decree." (App. 51.) The district court applied California contract law principles to interpret the Consent Decree and found the language unambiguous:

> The phrase "as medically indicated," as commonly understood, denotes care and treatment according to professional standards responsive to diagnostic criteria. The Decree by its terms affirmatively obligates defendants to provide treatment according to clinical psychiatric norms. . .

(App. 56.)

The Ninth Circuit Panel's Decision

On October 16, 1996, a panel of the Ninth Circuit Court of Appeals reversed the district court in the opinion that is the subject of this Petition. *Gates v. Shinn*, 98 F.3d

463 (9th Cir. 1996) (App. 1-24.). The Ninth Circuit panel posed the problem presented as follows:

> The issue of specificity of the consent decree, in this context, amounts to a choice of who decides, whose view shall prevail, on disagreements such as those described above [concerning 13 modifications to the psychiatric program plan proposed by defendants that were recommended by the Mediator's experts]. If the parties had consented to a decree which provided with specificity that the thirteen proposed modifications should prevail, or provided for a specific standard compelling them, then the district court would decide whether the prison psychiatric regime met the standard. In the absence of a decree "specific in terms," the district court would lack the power to decide.

98 F.3d at 471. After listing what it believed to be eleven different possible standards that "appropriate psychiatric care as medically indicated" could reference, the panel determined that the standard was too vague to enforce:

> [T]he only standard for assessment and development of the psychiatric program is the meaningless one that it should be "appropriate." The lack of specific terms in the decree by which to measure, implies that the prison officials did not consent to having the court decide whether the level of psychiatric evaluation and treatment measured up.

98 F.3d at 472. The panel reversed the finding of contempt and vacated the order imposing additional require-

ments on defendants, on the grounds that § V.F.1 "does not command any conduct with specificity." *Id.*

In so holding, the panel construed the Decree in a manner irreconcilable with two prior published decisions of the Ninth Circuit in the same litigation. In 1995, an earlier panel of the Ninth Circuit was asked to determine whether this very clause — § V.F.1 — is adequately specific to be enforced. The issue arose in connection with a dispute over procedures used by defendants to restrain severely psychotic mentally ill inmates. The panel determined that § V.F.1, "is a sufficiently specific standard with which to judge defendants' compliance." *Gates v. Gomez*, 60 F.3d 525, 531 (9th Cir. 1995).

Similarly, in 1994, in an earlier appeal, the Ninth Circuit determined that the standard "adequate custody staff to properly supervise" (in a different section of the Decree) was not vague or ambiguous and was fully enforceable. *Gates v. Rowland*, 39 F.3d 1439, 1444 (9th Cir. 1994).

On December 6, 1996, a timely Petition for Rehearing and Rehearing en Banc was denied. (App. 25-26.)

REASONS WHY THE PETITION SHOULD BE GRANTED

Introduction

> If a party can make himself a judge of the validity of orders which have been issued, and by his own act of disobedience set them aside, then are the courts impotent, and what the Constitution now fittingly calls 'the judicial power of the United States' would be a mere mockery.

Young v. United States ex. rel. Vuitton et Fils S.A., 481 U.S. 787, 796 (1987) (quoting from *Gompers v. Bucks Stove and Range Co.*, 221 U.S. 418, 450 (1911)). *Accord*, *Walker v. City of Birmingham*, 388 U.S. 894 (1967).

There are powerful reasons for the Court to review the issues presented here.

First, there are serious conflicts between the decision of the Ninth Circuit here and the decisions of other Circuits on the power of the district courts to remedy defiance of disputed consent decree provisions.

The holding here conflicts with the more sensible rule set forth by the Sixth Circuit in *Glover v. Johnson*, 934 F.2d 703 (6th Cir. 1991), which held: "defendants' failure to request the court to clarify, explain, or modify the language [of the consent decree] in the decade since the order was served precludes raising an ambiguity argument at this time." 934 F. 2d at 708. The Eleventh Circuit agrees with the Sixth. *Combs v. Ryan's Coal Co., Inc.*, 785 F.2d 970 (11th Cir. 1986).

Second, the Court should grant this petition to articulate the applicability of the national policy in favor of settlement and ADR in the Consent Decree context. The district court here determined that defendants refused "to cooperate in good faith with the very process designed to provide specific content to the terms of the decree." (ER 350.) The Ninth Circuit ignored both the role mediation plays in this case and defendants' defiance of the mediation process — a process defendants proposed and to which they consented.

Third, the Court should review this case to address the doctrine of "law of the case." The Court should exercise its supervisory authority to set forth a mandatory rule of deference within a circuit to the decisions of prior panels. Just such a prudential rule concerning the law of the case doctrine has already been adopted judicially by the Fifth Circuit and by the internal operating rules of the Third Circuit, which therefore squarely conflict with the Ninth Circuit. The very same Consent Decree provision which the Ninth Circuit opinion suggests is "meaningless," 98 F.3d at 472, was determined by a prior Ninth Circuit panel to be "a sufficiently specific standard with which to judge defendants' compliance." *Gates v. Gomez*, 60 F.3d 525, 531 (9th Cir. 1995).

I.

THE COURT SHOULD GRANT THE PETITION TO RESOLVE THE CONFLICT AMONG THE CIRCUITS CONCERNING WHETHER A DEFENDANT, WHO HAS FAILED TO SEEK MODIFICATION OR CLARIFICATION OF A CONSENT DECREE PROVISION, MAY RAISE VAGUENESS AS A DEFENSE TO CIVIL CONTEMPT

The rule of law that the Ninth Circuit has made in this case conflicts with decisions of the Sixth and Eleventh Circuits. The approach of the other Circuits should be approved because it takes into account the contractual nature of consent decrees and is more consistent with this Court's teachings. See *McComb v. Jacksonville Paper Co.*, 336 U.S. 187 (1948); *Walker v. City of Birmingham*, 388 U.S. 307, 317 ("The breadth and vagueness of the injunction itself would . . . be subject to substantial constitutional question. But the way to raise that question was to apply to the Alabama courts to have the injunction modified or dissolved.").

This case is not distinguishable from the Sixth Circuit case of *Glover v. Johnson*, 934 F.2d 703 (6th Cir. 1991), a class action concerning the provision of equal educational and vocational opportunities to female prisoners in Michigan. In *Glover*, the defendant argued at a contempt hearing that provisions of a 1981 consent order requiring a "systematic and coherent course package" and paralegal training until there was "a pool of adequately trained writ writers" were ambiguous. The appellate court dismissed this contention:

> It suffices to say that the 1981 final order was a negotiated settlement between the parties. Defendants did not object to the language until now and have never asked the district court to clarify the purportedly ambiguous language. Moreover, we find the language unambiguous and, even if it were ambiguous, defendants' failure to request the court to clarify, explain, or modify the language in the decade since an order was served precludes raising an ambiguity argument at this time.

934 F.2d at 708-709.

This case also conflicts with *Combs v. Ryan's Coal Co., Inc.*, 785 F.2d 970 (11th Cir. 1986). In *Combs*, defendants argued that a provision requiring them to comply with a collective bargaining agreement violated the provision of Rule 65(d) that an injunction not incorporate another document by reference. In response to the defendants' argument, which relied on *International Longshoreman's Ass'n v. Philadelphia Marine Trade Ass'*, 389 U.S. 64, 76 (1967) (one of the cases relied on by the Ninth Circuit here, App. 13), the Eleventh Circuit made two determinations. First, that it was clear that *Longshoreman's*, which was concerned with fair notice, did not lay down a per se rule, since the decree at issue there could fairly be described as "unintelligible." *Combs*, 785 F.2d at 979. Second, like the Sixth Circuit, the Eleventh Circuit relied on the failure of defendants to seek clarification or modification:

> [A]t no time before the trial court did appellants ever complain about the adequacy of the consent decree which they themselves

> helped to craft. They made no attempt to request more specific language; they chose not to exercise their right to the usual remedy for inadequacies of this sort: a motion for clarification or modification of the consent decree.

785 F.2d at 979.

Both *Glover* and *Combs* draw on this Court's reasoning in *McComb v. Jacksonville Paper Co.*, 336 U.S. 187 (1948). The defendants in *McComb* were found to be in violation of a court decree requiring them to refrain from violating a state minimum wage act. Defendants argued that this provision was too general to enforce. This Court disagreed:

> Decrees of . . . generality are often necessary to prevent further violations where a proclivity for unlawful conduct has been shown. [citation omitted]. . . [I]f there were extenuating circumstances or if the decree was too burdensome . . . there was a method of relief apart from an appeal. Respondents could have petitioned the District Court for a modification, clarification, or construction of the order.

336 U.S. at 192. *See also*, *Walker v. City of Birmingham*, 388 U.S. 307 (1967).

So here. The district court rejected defendants' attempt to avoid a contempt citation stating: "because the phrases at issue were mutually agreed upon by the parties, and defendants have never sought their modification, the objections as to vagueness are disingenuous." (App. 49.)

Here, the Ninth Circuit nevertheless held as a matter of law that § V.F.1 of the Consent Decree, in which defendants contractually agreed to provide "appropriate psychiatric evaluation and treatment . . . as medically indicated," App. 87, § V.F.1, is "meaningless" and "does not command any conduct with specificity." 98 F.3d 472.

To the extent that the Ninth Circuit panel's holding is that the phrase "appropriate psychiatric treatment as medically indicated" does not, standing alone, command conduct with enough specificity to hold someone in contempt, plaintiffs agree with the panel. See F.R.C.P. 65(d). However, in this dispute, defendants were told in concrete terms what they needed to do to comply with the Consent Decree, by the person defendants agreed would make that determination. See App. 49-50; see also App. 90, Consent Decree § V.F.5. ("the Mediator, if necessary, will independently investigate the [outpatient psychiatric] program, in the determination of the adequacy of defendants' program for providing appropriate psychiatric services.").

This Ninth Circuit panel looked at the one phrase in isolation, divorced from context and from the contractual setting of the decree.

The approach of the Sixth and Eleventh Circuits is more in harmony with the key decisions and teachings of this court on the issues of consent decree interpretation pursuant to contractual and equitable principles. See *United States v. ITT Continental Baking Co.*, 420 U.S. 223, 236-237 (1975) ("since consent decrees and orders have many of the attributes of ordinary contracts, they should be construed basically as contracts, without reference to the legislation the Government originally sought to enforce but never proved applicable through litigation."); *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367, 378, 112 S.Ct. 748, 116 L.Ed.2d 867, 883 (1992) (consent

decree "in some respects is contractual in nature"); *Swann v. Charlotte-Mecklenberg Board of Education*, 402 U.S. 1, 15 (1971) ("the scope of a district court's equitable powers . . . is broad, for breadth and flexibility are inherent in equitable remedies.").[2/]

The conflict between the Circuits on this critical issue should be resolved and this Court should endorse the holdings of the Sixth and Eleventh Circuits and reject the approach of the Ninth Circuit which is inconsistent with this Court's precedents concerning the enforcement of consent decrees and the power of a district court to enforce its lawful orders through contempt.

[2/] In addition, the panel did not give proper deference to the district court's interpretation of the Consent Decree in this case. See *Rufo*, 502 U.S. at 394 (1992) (O'Connor, J. concurring) ("Our deference to the District Court's exercise of its discretion is heightened where . . . the district court has effectively been overseeing a large public institution over a long period of time"); *Hutto v. Finney*, 437 U.S. 678, 688 (1978) (substantial deference given to district court given its "years of experience with the problem at hand").

II.

THE COURT SHOULD GRANT THE PETITION TO VINDICATE THE NATIONAL POLICY IN FAVOR OF SETTLEMENT AND ALTERNATIVE DISPUTE RESOLUTION IN THE CONSENT DECREE CONTEXT

The Ninth Circuit's opinion ignores the importance of the Decree's mediation process in giving concrete content to disputed provisions and plans. In doing so, it undermines the agreement reflected in the Consent Decree. The furtherance of the national policy encouraging parties to settle rather than litigate disputes and to participate in good faith in ADR procedures requires review of the Ninth Circuit's decision.

The district court made two critical factual findings concerning the dispute resolution process employed by the Consent Decree here:

> 1. The dispute resolution process was designed to give content to disputed or general terms and provisions in the Consent Decree. (App. 54, 60); and
>
> 2. "Ongoing disputes [concerning the OPP] . . . have not been successfully resolved through the informal mediation process. . . Defendants have used these purported ambiguities as excuses for persisting in conduct which has explicitly been found non-compliant, and for refusing to cooperate in good faith with the very process designed to provide specific content to the terms of the Decree." (App. 54.)

The Ninth Circuit's failure to address these findings is inconsistent with this Court's teaching concerning the nature of consent decrees and the need for flexibility in remedial stages of complex institutional reform cases. *Cf.*, *Rufo*, *supra*, 502 U.S. at 381 ("The experience of the District Courts and the Courts of Appeals in implementing and modifying such decrees has demonstrated that a flexible approach is often essential to achieving the goals of reform litigation.")

The parties wisely chose to use a durable standard in the Decree, animated by the ADR process, to provide the flexibility to adjust to changes in medical science and to address unanticipated obstacles to the complex challenges of providing necessary mental health care within a high security prison.

The Ninth Circuit's rationale would require the parties to agree to rigid, inflexible standards which would discourage settlement of institutional reform cases.

In the last two decades, a clear national policy in favor of settlements and alternative dispute resolution has evolved, responding in part to the overwhelming number of cases clogging the federal courts. The decision of the Ninth Circuit here threatens to undermine that policy and discourage use of consent decrees.

The district court held defendants in contempt, in part, for failure to participate in good faith and for overtly resisting a system of mediation of disputes which defendants co-developed and consented to in the Decree. (App. 54, 60.) This ADR process, which includes the use of a Mediator defendants selected to informally and then formally attempt to settle disputes, has efficiently avoided federal court litigation of numerous disputes that have

arisen in this case. (*See e.g.*, CD 484-486, 492, 493, 512-513, 514, 529, 533, 534.)

The federal policy in favor of settlement is embodied in several of the Federal Rules of Civil Procedure. For example, in the 1983 Amendment Advisory Committee Notes to FRCP 16, it states that:

> Since it obviously eases crowded court dockets and results in savings to the litigants and the judicial system, settlement should be facilitated at as early a stage of the litigation as possible. . . . In addition to settlement, Rule 16(c)(7) refers to exploring the use of procedures other than litigation to resolve the dispute. This includes urging the litigants to employ adjudicatory techniques outside the courthouse.

Advisory Committee Notes to 1983 Amendment to Rule 16 of the Federal Rules of Civil Procedure. See also 1993 Amendments Advisory Committee Notes to Rule 16 ("the judge and attorneys can explore possible use of alternative procedures such as mini-trials, summary jury trials, mediation, neutral evaluation, and nonbinding arbitration that can lead to consensual resolution. . .").

A clear Congressional policy in favor of settlement using alternatives to litigation is also expressed in the Civil Justice Reform Act of 1990, which authorized district courts to require that representatives "with authority to bind [parties] in settlement discussions" be available during settlement conferences. 28 U.S.C. § 473(b)(5). In addition, the Act calls for the development of expense and delay reduction plans which may include "authorization to refer appropriate cases to alternative dispute resolution programs," 28 U.S.C. § 473(a)(6), and "a neutral evaluation

program for the presentation of the legal and factual basis of a case to a neutral court representative." 28 U.S.C. § 473(b)(4).

The agreement to mediate here is usefully seen as analogous to the agreement to arbitrate in a collective bargaining setting. The Mediator, with "expertise in . . . correctional administration," App. 105, is like a labor arbitrator, who is conversant with the complex law of the shop. The use of an individual familiar with the organizational context in which she is deciding disputes is critical in these complex institutional settings. See *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 579, 80 S.Ct. 1347, 4 L.Ed.2d 1413 (1960):

> There are too many people, too many problems, too many unforeseeable contingencies to make the words of the contract the exclusive source of rights and duties. One cannot reduce all the rules governing a community like an industrial plant to fifteen or even fifty pages. Within the sphere of collective bargaining, the institutional characteristics and the governmental nature of the collective bargaining process demand a common law of the shop which implements and furnishes the context of the agreement.

The Consent Decree in this case contains a mediation process similar to labor arbitration in that "the processing of disputes through the grievance machinery is actually a vehicle by which meaning and content are given to the . . . agreement." *Steelworkers*, 363 U.S. at 581; See App. 54, 60, District Court Order (the mediation process is "designed to provide specific content to the terms of the decree.").

This Court should review this case to reaffirm the national policy in favor of settlement and ADR and to assure its applicability to settlement of complex disputes. The use of flexible and innovative consent decrees and the use of ADR in consent decrees and settlement agreements should be encouraged.

III.

THE COURT SHOULD GRANT THE PETITION TO ENHANCE JUDICIAL ECONOMY AND PROMOTE FAIRNESS AND CERTAINTY BY MAKING THE DOCTRINE OF LAW OF THE CASE MANDATORY RATHER THAN DISCRETIONARY

"In litigation generally, and in constitutional litigation most prominently, courts in the United States characteristically pause to ask: Is this conflict really necessary?" *Arizonans for Official English et al. v. Arizona*, ___ U.S. ___, 117 S.Ct. 1055, 1072 (March 3, 1997). The conflict created by the Ninth Circuit here is not necessary because every issue raised by defendants in this appeal was previously raised, litigated, and decided in a prior appeal — including the issue on which defendants prevailed before the Ninth Circuit here.

The doctrine of law of the case applies here. "Under the law of the case doctrine a decision of the court in a prior appeal must be followed in all subsequent proceedings in the same case." *Eichman v. Fotomat Corp.*, 880 F.2d 149, 157 (9th Cir. 1989). "[O]ne panel of an appellate court will not as a general rule reconsider questions which another panel has decided on a prior appeal in the same case." *Kimball v. Callahan*, 590 F.2d 768, 771 (9th Cir.), *cert. denied*, 444 U.S. 826 (1979).

"The law of the case controls unless the first decision is clearly erroneous and would result in manifest injustice, an intervening change in the law has occurred, or the evidence on remand is substantially different." *Eichman*, 880 F.2d at 157 (citation omitted). The law of the case applies to "issues decided explicitly or by necessary implication in this court's previous disposition." *Liberty Mutual Insurance Co. v. EEOC*, 691 F.2d 438, 441 (9th Cir. 1982).

However, the law of the case doctrine is not binding in the Ninth Circuit. *Pit River Home and Agr. Co-Op Ass'n v. United States*, 30 F.3d 1088, 1097 (9th Cir. 1994) ("The law of the case doctrine is a discretionary one created to maintain consistency and avoid reconsideration, during the course of a single continuing lawsuit, of those decisions that are intended to put a matter to rest. Law of the case is not synonymous with preclusion by final judgment."); *United States v. Houser*, 804 F.2d 565, 567 (9th Cir. 1986) (law of the case doctrine "is discretionary, not mandatory"); *Hanna Boys Center v. Miller*, 853 F.2d 682, 686 (9th Cir. 1988) (law of the case doctrine "is not an inexorable command").

The law of the case doctrine should be binding here because the issue of whether § V.F.1 is a sufficiently specific standard to be enforced was already decided prior to this appeal. The Ninth Circuit panel in *Gates v. Gomez*, 60 F.3d 525 (9th Cir. 1995) determined that § V.F.1 of the decree, "is a sufficiently specific standard with which to judge defendants' compliance." *Id.* at 531. Similarly, in an even earlier appeal in this case, the panel in *Gates v. Rowland*, 39 F.3d 1439, 1444 (9th Cir. 1994) found that

the standard "adequate custody staff to properly supervise" was not vague or ambiguous and was fully enforceable.[3/]

The parties, the Mediator, the Magistrate Judge and the district court should have been able to rely on these earlier decisions in their conduct of the litigation and their joint effort to implement the remedial process set forth in the Consent Decree.

This Court should exercise its supervisory authority to unify the law and make the law of the case doctrine mandatory. Two Circuits have already done so. The Fifth Circuit has done so judicially. See *Harris v. Sentry Title Co.*, 806 F.2d 1278, 1282 (5th Cir. 1987) ("As this Court has noted in previous cases, 'In this circuit, . . . the law-of-the-case doctrine is supplanted by our firm rule that one panel cannot disregard the precedent set by a prior panel even though it perceives error in the precedent.'") (emphasis added). In the Third Circuit, the internal operating procedures of the Circuit prohibit reconsideration of an issue decided by an earlier panel. *Lesko v. Lehman*, 925 F.2d 1527, 1554 n. 26 (3rd Cir. 1991).[4/]

[3/] Another issue previously decided by a Ninth Circuit panel and ignored by this panel is that the Consent Decree here should be interpreted pursuant to principles of California contract law. See *Gates v. Rowland*, 39 F.3d at 1444.

[4/] The position of the other Circuits with respect to the amount of discretion given a panel in reconsidering an issue decided by a prior panel varies. Compare *Hanover Insurance Co. v. American Engineering Co.*, 105 F.3d 306, 312 (6th Cir. 1997) (doctrine of law of the case "discretionary" and "not an inexorable command") with *Cohen v. Brown*, 101 F.3d 155, 168 (1st Cir. 1997) ("we have

(continued...)

A number of courts have noted the strong policy reasons that support deference to the decisions of prior panels. See *Vieux Carre Property Owners Residents & Assocs. v. Brown*, 40 F.3d 112, 116 n. 6 (5th Cir. 1994) ("revision . . . of settled issues is imprudent in light of the superior knowledge of the original panel . . . and the risk of undermining litigation decisions of the parties adopted in reliance upon it"); *United States Office of Personnel Management v. FLRA*, 905 F.2d 430, 434 (D.C. Cir. 1990) (adherence to decisions of prior panels promotes judicial efficiency and discourages panel shopping).

In this case, no extraordinary circumstances are evident or mentioned to justify disregarding the Ninth Circuit's prior ruling. Here defendants simply repeated already defeated arguments in support of their defiance of the Consent Decree. Indeed, defendants again raised their ambiguity argument until they got the result they wanted. This kind of panel shopping causes uncertainty in the law, encourages multiple appeals and results in inefficient use of scarce judicial resources. It is also unfair to the litigants. It should be discouraged by making the law of the case doctrine mandatory.

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[4]/(...continued)
determined that issues decided on appeal should not be reopened" except in very rare circumstances).

CONCLUSION

For the foregoing reasons, the Court should grant the Petition for Writ of Certiorari.

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Respectfully submitted

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